

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID WAYNE MOORE
Claimant

VS.

CENTURY CONCRETE, INC.
Respondent
Self-Insured

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Docket No. 172,177

ORDER

Respondent appealed an Award of Administrative Law Judge Alvin E. Witwer dated January 17, 1996. The Appeals Board heard oral argument in Kansas City, Kansas on May 21, 1996.

APPEARANCES

Claimant appeared by his attorney, D. Scott Brown of Kansas City, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Frederick J. Greenbaum of Kansas City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent requested the Appeals Board to review the single issue of nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidentiary record, considering the briefs and hearing the arguments of the parties, the Appeals Board finds as follows:

Claimant was injured on October 28, 1992 while working as a truck driver for the respondent. The accelerator stuck on the concrete truck claimant was driving, causing him to loose control. The truck tipped over on its left side and slid to a stop. Claimant received

injuries to his left shoulder, left elbow, left wrist and left thumb. He was off work as a result of those injuries from October 29, 1992 to January 1, 1993. He was then able to return to his regular truck driving job. Claimant remained employed by the respondent until August of 1994 when his employment was terminated due to circumstances not related to his injuries. Accordingly, we find claimant's disability is limited to functional impairment. See K.S.A. 1992 Supp. 44-510e(a).

Following his accident, claimant was immediately treated at the Shawnee Mission Medical Center emergency room. Over the next two years, claimant was examined and received treatment from Dr. Myron Hultgren of Occupational Medicine Associates; Dr. John A. Pazell, an orthopedic surgeon; and Dr. Roger W. Hood, an orthopedic surgeon. Claimant also was examined and evaluated for permanent functional impairment and restrictions at claimant attorney's request on August 13, 1993 by Dr. Edward J. Prostic, an orthopedic surgeon. The parties could not agree to a permanent functional impairment rating and, therefore, the Administrative Law Judge, pursuant to K.S.A. 1992 Supp. 44-510e(a), ordered an independent medical examination of the claimant by Dr. Ronald Zipper, D.O., an orthopedic surgeon, on June 9, 1995.

Dr. Prostic and Dr. Hood both testified in this matter and Dr. Zipper's independent medical examination report was made part of the record by the Administrative Law Judge pursuant to K.S.A. 44-510e(a). Dr. Prostic found claimant to have a permanent functional impairment as a result of his work-related injuries to his left shoulder and left thumb. He then combined these injuries for a 10 percent whole body rating. Dr. Zipper also found that claimant had suffered permanent impairment as a result of his work-related accident to his left shoulder and left thumb for a 6 percent whole body functional impairment. Dr. Hood, however, found claimant had injured his left shoulder and left upper extremity but the injuries had resolved and there was no resulting permanent functional impairment.

The Administrative Law Judge found that the most persuasive medical opinion contained in the evidentiary record was that of Dr. Zipper, who provided the independent medical examination of claimant. Accordingly, the Administrative Law Judge found claimant was entitled to permanent partial general disability benefits in the amount of 6 percent based on Dr. Zipper's functional impairment rating.

The respondent admitted that claimant sustained injuries to his left upper extremity involving primarily the claimant's left wrist and left thumb as a result of his work-related accident of October 28, 1992. However, the respondent argued that because claimant never complained about a left shoulder injury until he saw Dr. Prostic on August 13, 1993, that claimant did not suffer a left shoulder injury in the accident. Respondent also argued that even if the left shoulder was injured, all of claimant's injuries had resolved and the injuries had not resulted in permanent functional impairment. Respondent contended that the most credible and persuasive medical evidence was that of Dr. Hood, one of claimant's treating physicians, who opined that all claimant's injuries had resolved and he had not suffered any permanent functional impairment. Respondent further argued that Dr. Zipper's opinions were not credible because Dr. Zipper was not one of claimant's treating physicians and he based a portion of his opinions on claimant's subjective complaints.

The Appeals Board has reviewed the whole record and finds that the Award of Administrative Law Judge should be affirmed. Contrary to respondent's arguments, the Appeals Board finds that the evidentiary record established that claimant's left shoulder

was injured in the accident. The Appeals Board finds that claimant's left shoulder was examined and treated immediately after the accident by Shawnee Mission Medical Center and subsequently by Dr. Hultgren and Dr. Pazell prior to claimant being examined by Dr. Prostic on August 13, 1993. Additionally, the Appeals Board disagrees with respondent that Dr. Zipper's medical opinions should not be considered as credible evidence in this matter. The Appeals Board finds that the respondent presented no evidence in the record that would render Dr. Zipper's medical opinions not credible. Therefore, the trier of fact has the discretion to give Dr. Zipper's medical opinions as much weight as it deems appropriate. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan 778 (1991).

The Administrative Law Judge has set out his findings of fact and conclusions of law in some detail in his Award. It is not necessary to repeat those findings and conclusions in this Order. The Appeals Board finds that the findings and conclusions of the Administrative Law Judge are accurate and appropriate and adopts them as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Alvin E. Witwer dated January 17, 1996 should be, and is hereby, affirmed in all respects.

All other orders contained in the Award of the Administrative Law Judge are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of May 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: D. Scott Brown, Kansas City, KS
Frederick J. Greenbaum, Kansas City, KS
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director